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In the Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY, et al.,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF LEGAL HISTORIANS AND LAW SCHOLARS ON BEHALF OF RESPONDENTS

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INTEREST OF AMICI

Amici are legal historians, law scholars, and historians of American legal and religious culture who have studied and written in the areas of American and British legal and constitutional history, constitutional law, and religion and the law. We are current and former professors and practitioners who teach or have taught courses in American and British legal history, American and British constitutional history, constitutional law, First Amendment law, religion and the law, religion and politics, seventeenth, eighteenth, and nineteenth century American history, and in related areas in law schools and undergraduate and graduate schools across America. We have authored and edited books and written articles in scholarly journals on related subjects. Many of us are members of the American Society for Legal History, the leading professional association for legal historians.[1]

Amici file this brief in support of the Respondents' challenge to the placement of Ten Commandments displays in the McCreary and Pulaski County courthouses.[2] It is our belief, based on our training and study as legal historians and law scholars, that there is no historical basis of support for Petitioners' claim that the Ten Commandments "played a significant role in the foundation of our system of law and government."

Our names and institutional affiliations (listed for identification purposes only) are contained in Appendix A.

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[1] This brief is filed with the consent of the parties. No counsel for either party to this matter authored this brief in whole or in part and no person or entity, other than amici or their counsel, made a monetary contribution to the preparation of this brief.

[2] As addressed infra at note 7, amici request that the material presented in this brief also be considered in adjudicating *Van Orden v. Perry*, No. 03- 1500, to the extent this material is deemed relevant.

SUMMARY OF ARGUMENT

Petitioners justify their display of the Ten Commandments in the McCreary and Pulaski County courthouses on the ground that the "Ten Commandments have profoundly influenced the formation of Western legal thought" and "provide the moral background of the Declaration of Independence and the foundation of our legal tradition." This claim that the Ten Commandments have "profoundly influenced" America's legal tradition is not supported in historical fact. On the contrary, the historical record reveals that the Ten Commandments had minimal impact on the development of American law. As a result, there is no historical basis for singling out the Ten Commandments as seminal in the foundation of American law.

ARGUMENT

I. THE PETITIONERS' ARGUMENT THAT THE TEN COMMANDMENTS "PLAYED A SIGNIFICANT ROLE IN THE FOUNDATION OF OUR SYSTEM OF LAW AND GOVERNMENT" IS AN ARGUMENT FOR THE PRIMACY OF THE TEN COMMANDMENTS OVER RECOGNIZED LEGAL SOURCES.

It is indisputable that the Ten Commandments originated as, and remain, a religious text.[3] It is equally indisputable that the

[3] *See Stone v. Graham*, 449 U.S. 39, 41-42 (1980) (finding the Ten Commandments to be "undeniably a sacred text"); *Adland v. Russ*, 307 F.3d 471, 480 (6th Cir. 2002); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 770-71 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002); *Books v. City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000); *Harvey v. Cobb County*, 811 F. Supp. 669, 677-78 (N.D. Ga. 1993), *aff'd mem.*, 15 F.3d 1097 (11th Cir. 1994). As the Seventh Circuit has opined: "[T]he Ten Commandments is a religious and sacred text that transcends secular ethical or moral concerns. . . . [I]ts very text commands the reader to worship only the

precepts contained in some of the Ten Commandments have been inspirational in the development of the Western legal tradition. At the risk of oversimplification, many legal matters rest on notions of right and wrong that, in turn, are normative concepts derived in part from religious texts and teachings.[4] Our normative legal standards also have their origins in *non*-religious sources, such as custom and classical law. And, in some instances, secular laws may "parallel . . . the Ten Commandments," without necessarily having any religious origins. *See Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 771 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002). None of these points is controversial.[5]

Lord God, to avoid idolatry, to not use the Lord's name in vain, and to observe the Sabbath. These particular commandments are wholly religious in nature, and serve no conceivable secular function." *O'Bannon*, 259 F.3d at 770-71.

[4] *See School District of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) ("[M]any of our legal, political and personal values derive historically from religious teachings."). *Accord* Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J. LAW & RELIGION 525, 525 (1999-2000) ("Few people, if any, would dispute that the Ten Commandments – and its parallels from other ancient cultures – as well as other directives contained in the Pentateuch of the Hebrew and Christian Scriptures, inform our notions of right and wrong and, as such, have influenced the development of Western law of which the American legal system is part.").

[5] As a result, the frieze on the Supreme Court courtroom with its image of Moses among fifteen other lawgivers makes only the vaguest claim of the influence of the Ten Commandments on the Western legal tradition and, unlike the instant controversy, does not convey a message that the Ten Commandments were "profoundly influential" or serve as "the foundation of our legal tradition." *See ACLU v. McCreary County, Kentucky*, 354 F.3d 438, 443 (6th Cir.

The Petitioners' argument that the Ten Commandments represent the "moral background of the Declaration of Independence and the foundation of legal tradition" is not an effort to restate these modest points. *See ACLU v. McCreary County, Kentucky*, 145 F. Supp. 2d 845, 848 (E.D. Ky. 2001). On the contrary, the Petitioners grossly exaggerate the significance of the Ten Commandments in the formation of American law while they assert the primacy of the Ten Commandments over recognized sources of law. In so doing, they have selected a document from one discrete religious tradition to the exclusion of other secular and religious influences with much greater historical pedigrees. *See Adland v. Russ*, 307 F.3d 471, 481-482 (6th Cir. 2002).[6]

The Petitioners' claim of a special relationship between the Ten Commandments and our legal and governmental systems is also conveyed by the original and subsequent compositions of the displays themselves. Initially installing solitary copies of the Ten Commandments in the courthouses, the petitioners later added several legal and historical documents to the displays – first, solely religious excerpts from several "historical" documents, and then entire versions of other legal and historical documents. *See ACLU v. McCreary County, Kentucky*, 354 F.3d 438, 442-443 (6th Cir. 2003). The third (and current) rendition of the displays is entitled "The Foundations of

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2003).

[6] All of the Petitioners' justifications for the displays relate to the Ten Commandments' relationship to the law. *See* 145 F. Supp. 2d at 848. Even if the Petitioners' purpose could be viewed more broadly to include a recognition of America's religious heritage, the placement of a single religious text, surrounded by legal and political texts, does not provide a meaningful account of our nation's diverse religious traditions, particularly where, as the lower courts found, there is no effort to integrate the Ten Commandments with the other documents.

American Law and Government Display." *Id.* Significantly, the Ten Commandments is the only religious document displayed alongside the Magna Carta, the Declaration of Independence, and the Bill of Rights, among other political and legal documents. As the district court found, the positioning of the Ten Commandments with political and legal documents, but not with other religious symbols or moral codes, "imbues it with a national significance constituting endorsement [of religion]." *McCreary*, 145 F. Supp. 2d at 851. A "reasonable observer will see one religious code placed alongside eight political or patriotic documents, and will understand that the counties promote that one religious code as being on a par with our nation's most cherished secular symbols and documents." *Id.* This positioning thus proclaims the Ten Commandments as the *singular* religious influence in the development of American law.

In essence, the petitioners are not simply claiming that some of the principles contained in the Ten Commandments have influenced ethical notions represented in American civil and criminal law. Rather, they are claiming that the Ten Commandments, as a unique aggregate document, has "*profoundly* influenced the formation" of American legal thought and *singularly* provides the "moral background of the Declaration of Independence and the foundation of legal tradition." *See McCreary*, 354 F.3d at 443 (emphasis added). This historical and legal claim, which we address in the next section, is inconsistent with the historical record.[7]

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[7] The record in *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), is inconclusive on this issue. Apparently, there is an absence of information indicating the original purpose behind the erection of the Ten Commandments monument on the Texas Capitol grounds. *See id.* at 179. However, the Fifth Circuit relied on a rationale similar to that advanced by the Petitioners in *McCreary*, with the court affirming the "influence [of the Ten Commandments] upon the civil and criminal laws of this country." *Id.* at 181. The court went on to

II. THERE IS NO HISTORICAL BASIS FOR SINGLING OUT THE TEN COMMANDMENTS AS SEMINAL IN THE FOUNDATION OF AMERICAN LAW.

The sources of law for the American colonies and later the United States are broad and varied. The principal early sources are the common and statutory law of England, but also influential was the law of the non-common law courts of England, such as equity, chancery, admiralty, orphans, and ecclesiastical courts. Other sources of American law include Roman law, the civil law of continental Europe in the post-Roman period, private international law, and Germanic tribal law.[8]

The various documents and texts that have figured prominently in these developments include, but are certainly not limited to, the Magna Carta, the writings of Sir Edward Coke, the English Bill of Rights, William Blackstone's *Commentaries on the Laws of England*, John Locke's *Second Treatise on Government* and *A Letter Concerning Toleration*, Adam Smith's *The Wealth of Nations*, Baron Montesquieu's *The Spirit of the Laws*, the Mayflower Compact, *Cato's Letters*, the

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state approvingly that the Texas State Preservation Board had "carefully chosen" the Decalogue's location "to reflect the role of the Commandments in the making of law." *Id.* Members of this Court have made similar claims. *See City of Elkhart v. Books*, 532 U.S. 1058 (2001) (Rehnquist, C.J., dissenting from denial of cert.); *Stone*, 449 U.S. at 196 (Rehnquist, J., dissenting). As a result, amici request that the material presented in this brief be considered in adjudicating *Van Orden* to the extent it is deemed relevant.

[8] *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 33-104 (2d ed. 1985); RICHARD B. MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW (2d ed. 1974); Michael Hoeflich, *Relationships Among Roman Law, Common Law, and Modern Civil Law: Roman Law in American Legal Culture*, 66 TULANE L. REV. 1723 (1992).

Declaration of Independence, the debates in the Constitutional Convention of 1787, the *Federalist Papers*, the United States Constitution, the Bill of Rights, St. George Tucker's Americanized version of Blackstone's *Commentaries* (Tucker's Blackstone), Joseph Story's *Commentaries on the Constitution*, the writings and speeches of American leaders during the revolutionary and early national periods, and the writings and speeches of abolitionists and Republican leaders from the antebellum period through the end of Reconstruction.

Each of these documents had a far greater influence on America's laws than the Ten Commandments. Indeed, the legal and historical record does not include significant and meaningful references to the Ten Commandments, the Pentateuch, or to biblical law generally. Aside from a failed attempt in the seventeenth century to establish a biblically based legal system in the Puritan colonies, American law is generally viewed as having secular origins.

A. Documents From the Pre-Colonial and Colonial Eras Are Generally Devoid of References to the Ten Commandments.

Most legal historians consider the Magna Carta of 1215 to be a seminal source of modern English, and later American, law.[9] The Magna Carta addressed various legal subjects, including inheritance; land ownership and sale; taxation; jury trials and trial procedure; proportionality in punishment; and the taking of property without compensation. The Magna Carta contains principles that are central to our legal culture today, including assertions that no person can be "seized or imprisoned, or stripped of his rights or possessions . . . except by the lawful judgment of his equals or by the law of the land." The Magna Carta made no reference to either the Ten

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[9] *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 22-54 (1967).

Commandments as a whole or any particular one of the Commandments. Although it made some references to God, these were formalistic and did not relate to the substantive content of the document.[10]

Colonialists were also influenced by the 1689 English Bill of Rights, which made the monarchy subject to the laws of Parliament and established legal rights and relationships for British citizens (e.g., freedom of speech; excessive bail and fines; cruel and unusual punishment; and the right to a jury trial). Like the Magna Carta, the English Bill of Rights was highly influential in the colonies; many of the colonies incorporated liberties guaranteed by the Magna Carta and the English Bill of Rights directly into their laws and governing documents. Like the Magna Carta, the English Bill of Rights did not mention the Ten Commandments. It made passing references to "God," but these references were again highly formalistic and bore no relationship to the substance of the document.[11]

The concessions granted by King John in the Magna Carta were largely limited to the baronial families at the top of the rigidly structured feudal system. In the early seventeenth century, however, Sir Edward Coke used the Magna Carta to argue for an expansion of rights and liberties to all people in Britain.[12] As a result of Coke's influence, most of the early colonial charters contained a clause asserting that the colonists would have the rights of natural-born English citizens. When

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[10] *See* CONTEXTS OF THE CONSTITUTION 657-666 (Neil H. Cogan ed., 1999).

[11] *Id.* at 686-692.

[12] May 17, 1628, in debate in House of Commons, as quoted in J.R. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY, 1603-1689, at 63 (1928, reprint 1960) (citing John Rushworth, 1 HISTORICAL COLLECTIONS 562 (1682)).

American colonists spoke of their "rights as Englishmen," whether in the early colonial period or later at the time of the Revolution, they had in mind, among other things, the rights and privileges found in the Magna Carta and the English Bill of Rights.[13]

Biblical law was also among the myriad influences that shaped early colonial statutory and common law.[14] This influence was characterized by enormous temporal and regional variations. Religious influences were most pronounced in the early New England colonies (Massachusetts Bay, New Haven, Connecticut, and Plymouth), with the influence of biblical law at its apex in the Massachusetts Bay and Plymouth[15] colonies between 1620 and the 1680s.[16]

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[13] Coke also influenced the development of colonial law, and ultimately American law, through his four-volume treatise, *Institutes of the Laws of England*, which was widely read by American lawyers throughout the colonial period. This essentially secular text helped shape American notions of liberty. Although Coke's *Institutes* makes passing references to "God," these are, once again, highly formalistic and hortatory.

[14] BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606-1660, at 4-15 (1983); GEORGE LEE HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 141-162 (1960); Julius Goebel, Jr., *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931).

[15] The Mayflower Compact, enacted by the Plymouth Colony in 1620, is often seen as the first act of self-government in the American colonies. This document mentions both "God" and the "Christian Faith," but makes no mention of the Ten Commandments. *See* CONTEXTS OF THE CONSTITUTION 1.

[16] *See generally* THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS (Thomas G. Barnes ed., 1975) (facsimile reprint 1648); *see also* HASKINS,

Even in those colonies, however, reliance on the Ten Commandments themselves (as opposed to reliance on biblical law as a whole) was proportionately insignificant and largely limited to particular criminal and domestic laws, such as blasphemy and adultery.[17] Thus, even though many of the early Puritan leaders believed in the supremacy of biblical law, they relied primarily on other, secular sources – including local innovation – for the bulk of their laws.[18]

Furthermore, these colonies' reliance on biblical principles was relatively short-lived. The Glorious Revolution of 1688-89 brought about a new charter in Massachusetts Bay, ending the "experiment" of this most-religious-of-all-the-colonies. The new charter removed almost all references to biblical law and replaced them with common law practices and procedures. Although Massachusetts law still retained a few remnants of biblical law after 1691, the laws of the colony in this period, and later the state, were essentially secular, based primarily on English law, indigenous law, and local custom.[19]

LAW AND AUTHORITY 136-37.

[17] *See* HASKINS, LAW AND AUTHORITY 136-37. It cannot be said that the English settlers of the New World would not have enacted these statutes absent the Ten Commandments. Laws punishing theft, murder, and perjury are found in virtually every culture, and were deeply ingrained in the laws of pre-Christian England as well as in the English common law.

[18] Another influential text was Michael Dalton's *The Countrey Justice* (1618, reprint 1973), a popular – and secular – handbook for British justices of the peace. *See* HASKINS, LAW AND AUTHORITY 137.

[19] RUSSELL K. OSGOOD, THE HISTORY OF THE LAW IN MASSACHUSETTS 10-13 (1992); MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW 62-64.

Reliance on biblical principles was even less pronounced in the non-Puritan colonies. In Virginia, the oldest and most important of the British colonies, an attempt to base a system on the Decalogue ended early with the colony quickly resorting to common law.[20] A review of Virginia's colonial laws demonstrates that only a small subset of the colony's legislative enactments (e.g., Sabbath laws) can be said to parallel the Ten Commandments. Even then, nothing in the colonial record indicates that the colonialists viewed the law as being based on the Bible or the Ten Commandments.[21] A secular common law was also applied in Pennsylvania and New York, despite the latter colony initially relying on Massachusetts Bay's *Lawes and Libertyes* as a model.[22]

The clearest contrast from the Puritan colonies is seen in Rhode Island, where its founder, Roger Williams – who had been exiled from Massachusetts Bay in part because of his refusal to accept the religious aspects of its legal culture – expressly rejected arguments that Mosaic law should serve as a model for civil law, relying instead on secular English law for authority.[23]

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[20] *See* Perry Miller, *Religion and Society in the Early Literature of Virginia*, *in* ERRAND INTO THE WILDERNESS 99-140 (1956); CHAPIN, CRIMINAL JUSTICE 4-15; ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 3-38 (1930).

[21] *See* sources in note 20, supra.

[22] *See* JOHN WEBB PRATT, RELIGION, POLITICS AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK HISTORY 29-37 (1967); J. WILLIAM FROST, A PERFECT FREEDOM: RELIGIOUS LIBERTY IN PENNSYLVANIA 15-18 (1990).

[23] To Williams and his followers, Christ's resurrection had abrogated the authority of the first four commandments (the "first table") and had restricted the precedent of Mosaic law to Old Testament Israel. *See* EDMUND S. MORGAN, ROGER WILLIAMS: THE

Furthermore, throughout the colonies, significant differences existed between legislative enactments and the mandates of the Ten Commandments over matters such as divorce, pre-marital sex, slavery, and inheritance. For example, the Bible provides that the first-born son should receive a "double portion" of inheritance (*Deuteronomy* 21:16). Massachusetts Bay adopted this provision in the seventeenth century, but the rest of the colonies rejected it, and instead accepted the English rules of primogeniture. Also, under biblical law, the wife could not inherit from her husband; rather, the brother inherited by marrying the wife. (*Deuteronomy* 25:5 and following). In all of the colonies, however, wives inherited outright or at least were entitled to their dower rights.[24]

In sum, the vast majority of the colonial codes, and the English sources from which they were principally derived, developed independently of the Ten Commandments.[25] Only a small fraction of colonial laws (e.g., Puritan codes) were derived from the Bible generally, and an even smaller subset

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CHURCH AND THE STATE 102-104, 128 (1967); EDWIN S. GAUSTAD, LIBERTY OF CONSCIENCE: ROGER WILLIAMS IN AMERICA 66-68, 80-85 (1991); CHAPIN, CRIMINAL JUSTICE 4-15.

[24] *See* Paul Finkelman, *The Ten Commandments on the Courthouse and Elsewhere*, __ FORDHAM. L. REV. __ (2005).

[25] As a result, Petitioners' claim (*see* Pet. Br. at 22) that "Twelve of the thirteen original colonies adopted the entire Decalogue into their civil and criminal laws" is flatly incorrect. *See* Zechariah Chafee, Jr., *Colonial Courts and the Common Law*, *in* ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 72-73 (D. Flaherty ed., 1969) ("[T]he view that colonial law was either rude or drawn from the Bible is dispelled by a study of court records, at least after the earliest periods of settlement.").

paralleled the Ten Commandments specifically.[26] Even then, reliance on biblical sources all but disappeared following the Glorious Revolution. Indeed, much of what became the central legal rights of the United States – due process of law; the right to confront witnesses; the right against self-incrimination; prohibitions on cruel and unusual punishments; freedom of speech; and, most of all, freedom of religion – may properly be seen as a *reaction* to the legal culture of the Puritan colonies, rather than as an endorsement thereof.

B. Religious Influences Further Declined During the Founding Era.

The most important source of the founding generation's attitudes toward law and government was the common law as brought over from Great Britain and adapted to meet America's indigenous needs.[27] During the eighteenth century, a developing market economy, dependent on trade with England and between the colonies, required a more formalized legal system with consistent procedural and substantive rules based on British common law.[28] Increasing religious heterogeneity in

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[26] *See* George E. Woodbine, *The Suffolk County Court, 1671-1680*, *in* ESSAYS 202 ("The presence of biblicism and Scriptural law is very little in evidence in [early colonial] records. Much has been written on the effect of the Mosaic law upon the legal situation in the New England colonies. Undoubtedly the influence of that law as a active legal force in their civilization has been greatly overstated.").

[27] BAILYN, IDEOLOGICAL ORIGINS 22-54; FRIEDMAN, HISTORY OF AMERICAN LAW 34-35.

[28] KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 22-23 (1989); MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW 62-64; FRIEDMAN, HISTORY OF AMERICAN LAW 48-49, 80.

the colonies in the 1700s further militated against reliance on biblical law.[29]

Rather than seeing the law as biblically based, the founding generation viewed the common law as a repository of human experience, embodying concepts of justice, equity, and the rule of law, not as representing divine principles. American revolutionaries cited the Magna Carta, Coke's *Institutes*, William Blackstone's *Commentaries on the Laws of England*, and other English legal sources in their struggle against the Crown and Parliament. Blackstone's *Commentaries*, written between 1765-1769 and considered the dominant lawbook in England and America for more than half a century after its publication, does not include a single reference to the "Decalogue" or the "Ten Commandments."[30] While Blackstone understood that canon law had influenced the development of British law (via the established Church of England) and made formalistic references to "God" and religion in his *Commentaries*, the system of law he described was secular and non-biblical. Throughout the *Commentaries*, Blackstone's discussion of property law, criminal law, marital law,

[29] In 1684, the Governor of the colony of New York, Thomas Dongan, reported to his superiors in London that: "Here bee not many of the Church of England; [a] few Roman Catholicks; abundance of Quakers preachers men and women especially; Singing Quakers, Ranting Quakers; Sabbatarians; Antisabbatarians; Some Anabaptists; some Independents; some Jews; in short of all opinions there are some, and the most part none at all." "Governor Dongan's Report on the State of the Province," 2 ECCLESIASTICAL RECORDS OF THE STATE OF NEW YORK 879-90 (1901).

[30] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Charles Harr ed., 1962). Blackstone's *Commentaries* were more popular in America than in England. *See* FRIEDMAN, HISTORY OF AMERICAN LAW 102.

inheritance law, and the rights of persons has little or nothing to do with, and is often at odds with, biblical law.[31]

The founding generation was also heavily influenced by the works of Enlightenment thinkers, principally John Locke's *Second Treatise on Government* (1690) and Baron Montesquieu's *Spirit of the Laws* (1748). The works of the radical whig philosophers, like John Trenchard and Thomas Gordon, the authors of *Cato's Letters* (1720-1723), were also influential. Trenchard and Gordon were strong advocates of freedom of expression and government accountability, and spoke out against corruption in the government and the Anglican Church. The founding generation also read and applied the writings of the Scottish Enlightenment, including those of Adam Smith, David Hume, and Francis Hutchinson.[32]

Locke's political writings refuted the doctrine of the divine and absolute right of Kings and established a theory of a "social contract" by which people – the ultimate sources of authority – delegated to government the responsibility to create an ordered society.[33] Locke's theories stand in sharp contrast to the notion of a government based on the concept that God is the lawgiver

[31] Blackstone wrote that there was a great body of law, termed municipal law, that derived its authority not from God, but from the "law of man." "There is, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficiency . . . ." COMMENTARIES, 4:42.

[32] *See* BAILYN, IDEOLOGICAL ORIGINS 35-54; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 291-305 (1969).

[33] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 408-412 (1965); HALL, MAGIC MIRROR 57-58.

and that secular law is subject to religious mandates. In his influential *A Letter Concerning Toleration*, Locke wrote that "the law of Moses," which includes the Ten Commandments, "in no way obligates Christians." "The business of law," he noted, was not to protect religious beliefs or "to provide for the truth of opinion," but rather to provide for "the security and safety of the commonwealth and each man's goods and person."[34]

Only slightly less influential among the founding generation was Montesquieu's *Spirit of the Laws*, which, among other matters, advocated separation of powers, toleration in religious belief, and freedom of worship.[35] Although Montesquieu addressed at length the relationship between government and religion, he did so without any emphasis on the Ten Commandments.

All of these sources were widely read by the Founding Fathers and are generally considered by historians and other scholars to be ideologically central to the founding of the nation. These writings were highly influential on the legal and political documents of the founding era, including the Declaration of Independence, the United States Constitution, and the American Bill of Rights.[36] To be sure, The Declaration of Independence includes prefatory references to the "Laws of Nature and of Nature's God" and a "Creator," but these are not acknowledgments of a law-giving biblical God.[37] On the

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[34] JOHN LOCKE, A LETTER CONCERNING TOLERATION 115-17, 123 (Raymond Klibansky ed. 1968).

[35] BAILYN, IDEOLOGICAL ORIGINS 27-29; WOOD, CREATION OF THE AMERICAN REPUBLIC 152-153.

[36] *See* BAILYN, IDEOLOGICAL ORIGINS 22-54.

[37] *See* ALLEN JAYNE, JEFFERSON'S DECLARATION OF INDEPENDENCE 26-30 (2002) ("It is the God of [Jefferson's] heterodoxy that appears

contrary, Jefferson and the Enlightenment writers on which he relied distinguished natural law from Old Testament law.[38] Equally important, Jefferson appealed to notions of popular sovereignty and self-determination in the Declaration. In asserting the right of the colonists to create their own nation he did not invoke God's name or even "nature's God" as justification. He did not claim that the new nation was formed on the basis of biblical law.[39] Rather, he asserted that

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in the Declaration of Independence rather than the God of the Bible."); *id.* at 19. *See also* CARL BECKER, THE DECLARATION OF INDEPENDENCE 24-78 (1958). *Accord* HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION 355 (1994) ("The idea of 'the laws of nature and of nature's God' is derived from classical political philosophy.").

[38] There is no evidence Jefferson or the other members of the drafting committee relied on any biblical sources in considering the language of the Declaration. In a subsequent letter to Richard Henry Lee, Jefferson wrote that the Declaration was "neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to give expression of the American mind. . . . All its authority rests on harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc." Jefferson to Lee, May 8, 1825, 10 THE WRITINGS OF THOMAS JEFFERSON 343 (Paul L. Ford ed., 1899).

[39] To be sure, Jefferson and the drafters consciously employed language that placed the Declaration within both an Enlightenment and theistic framework. According to Professor Davis, "most of the natural law doctrines could be viewed in tandem with traditional Christianity. * * * [The Declaration] is written in a theistic framework primarily because Jefferson, his committee, and indeed the Continental Congress at-large understood the colonists' authority to sever their relationship with Britain as resting upon a theistic, natural rights philosophy. Yet this theistic framework also was

"Governments are instituted among Men, deriving their just Powers from the Consent of the Governed," words that became the scripture for American democracy.[40] In essence, by relying on Enlightenment natural law, Jefferson was rejecting the primacy of revealed or divine law in the foundation of the new government.[41] Thus in no substantive way does the Declaration pertain to biblical law or the Ten Commandments, and, in fact, its references to natural law indicate a *rejection* of any such connection.[42]

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adopted because it was broad and general enough to capture the theistic framework in which most colonists understood all earthly events to take place. Thus it was neither specifically deistic (scientific worldview) nor Christian (biblical worldview), as either position would have excluded those adherents of the other." DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS 1774-1789: CONTRIBUTIONS TO ORIGINAL INTENT 108-109 (2000).

[40] *See* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 132-142 (1997).

[41] *See* JAYNE, JEFFERSON'S DECLARATION 38 ("[The first paragraph of the Declaration] does not refer to the God of revelation or the Bible but to 'Nature's God,' or [Lord] Bolingbroke's deistic God of natural religion. The impartiality of this God to all nations and peoples can be seen in Jefferson's reference to 'one People,' the colonists, who were under the 'Laws of Nature.' According to these 'Laws' and 'Nature's God' who established them, a people or a nation was not chosen by God over other peoples and nations on earth. Rather they were all given a 'separate and equal Station' by those 'Laws of Nature' and 'Nature's God.' *Jefferson's God of the Declaration is, therefore, antithetical to any God who would manifest partiality by choosing one people or nation over others, as did the God of the Old Testament.*") (emphasis added).

[42] *See* CORNELIA GEER LE BOUTILLIER, AMERICAN DEMOCRACY AND NATURAL LAW 110 (1950) ("[T]he Founding Fathers, as they employed the notion of natural law . . . gave it very often a utilitarian

Jefferson, for one, doubted the authenticity and authority of the Ten Commandments. In a later letter to John Adams, Jefferson wrote that "the whole history of [the Ten Commandments] is so defective and doubtful that it seems vain to attempt minute enquiry into it; and such tricks have been plaid with their text . . . that we have a right, from that cause, to entertain much doubt what parts of them are genuine."[43] In the same letter, Jefferson went on to refute the claim that Christianity served as a basis of the common law.[44] Adams' response was supportive, writing that Jefferson's research "in the laws of England, establishing Christianity as the Law of the Land and part of our common Law, are curious and very important. . . . In what sense and to what extent the Bible is Law, may give rise to as many doubts and quarrels as any of our civil political military or maritime Laws and will intermix with them all to irritate Factions of every sort."[45] Although Jefferson's religious views were not shared by all of his contemporaries, his expression of the philosophical bases of the new nation, as represented in the Declaration of Independence, was universally embraced.[46]

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meaning. Such a utilitarian meaning is logically in opposition to the transcendental meaning which relates to man's rational nature: it supplies a contrary premise.").

[43] Jefferson to Adams, Jan. 24, 1814, THE ADAMS-JEFFERSON LETTERS 421 (Lester J. Cappon ed., 1959).

[44] *Id.* at 422-423.

[45] Adams to Jefferson, March 3, 1814, *in id.* at 427.

[46] *See* MAIER, AMERICAN SCRIPTURE 135 ("By the time of the Revolution [Enlightenment and Whig] ideas had become, in the generalized form captured by Jefferson, a political orthodoxy whose basic principles colonists could pick up from sermons or newspapers or even schoolbooks without ever reading a systematic work of

The central legal documents of the United States – the Constitution and the Bill of Rights – did not include even a perfunctory or formalistic reference to God. Rather than relying on divine authority, the Constitution is "ordained" by "the People of the United States." The foundation of the law of the United States thus emanates from the nature of representative government – what Jefferson called "the consent of the governed" – and needs no external or divine authority for its support.[47]

Thus, it comes as no surprise that the Ten Commandments and biblical law received nary a mention in the debates and publications surrounding the founding documents. In the wide-ranging debates – reprinted in Madison's *Notes*, the *Annals of Congress*, Farrand's *Records*, Elliot's *Debates*, and elsewhere – the Founders mentioned Roman law, European Continental law, British law, and various other legal systems, but as can best be determined, no delegate ever mentioned the Ten Commandments or the Bible. The only serious discussion of religion led to the clause prohibiting religious tests for office-holding.[48]

Indeed, many of the framers made statements during the debates expressing the view that religion should be left to the

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political theory. *The sentiments Jefferson eloquently expressed were, in short, absolutely conventional among Americans of his time.*") (emphasis added). *Accord* DAVIS, RELIGION AND THE CONTINENTAL CONGRESS 102 ("There is every reason to believe that Jefferson strongly held to natural law theory as the essence of the universal order established by God and that most of the delegates also saw it that way.").

[47] *See generally* ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION 26-45 (1996).

[48] *See generally* THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987).

private sphere. James Madison noted in one debate that "Religion itself may become a motive to persecution & oppression. – These observations are verified by the Histories of every Country ancient & modern."[49] South Carolina's Charles Pinckney described "our true situation" as this: "a new extensive Country containing within itself the materials for forming a Government capable of extending to its citizens all the blessings of civil & religious liberty – capable of making them happy at home."[50] Similarly, George Reid of Delaware declared, in a debate over the power of Congress, that "the Legislature ought not to be too much shackled. It would make the Constitution like Religious Creeds, embarrassing to those bound to conform to them & more likely to produce dissatisfaction and Scism, than harmony and union."[51] This illustrates how the framers believed that minimizing the connection between religious law and civil law was integral to American liberty.

Similarly, neither the "Bible" nor "Scripture" nor the "Ten Commandments" appears in the index of the *Federalist Papers*, which are generally considered to contain the most important discussions of the meaning of the United States Constitution at the time of ratification.[52] The authors of the *Federalist Papers* made a handful of passing references to "God" and "gods," the

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[49] MAX FARRAND, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 135 (1966).

[50] *Id.* at 402.

[51] *Id.* at 582.

[52] *See generally* THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961).

"Almighty," "Heaven," and to religion (ancient and modern)[53] in one place (*Federalist 43*), Madison refers to "the transcendent law of nature and of nature's God," but this reference is suggestive of the deist views of Jefferson, rather than of an Old Testament God.[54] Rather than asserting a connection between biblical law and the new nation, most references to religion in the *Federalist Papers* denounce religious factions and intolerance and the mixing of church and state.[55]

To be sure, a handful of later legal commentators made vague claims that, on face value, support the Petitioners' claims about the relationship between the Ten Commandments and the law. For example, Joseph Story, extremely influential among early American lawyers through his numerous legal treatises, including his *Commentaries on the Constitution*, wrote an article in 1836 on "natural law" in which he referred to God as "our Lawgiver and Judge, [to whom] we owe an unreserved obedience to his commands."[56] However, this assertion was inspirational; it did not suggest a belief on the part of Justice Story that the law was derived from God's Commandments. In

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[53] *See, e.g., Federalist 38*: "It is impossible for the man of pious reflection not to perceive in it a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution." *Id.* at 230-231.

[54] According to Le Boutillier, Madison's phrasing in *Federalist* 43 "strips away its transcendental qualities as he says that it 'declared that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed.' This is utilitarianism." LE BOUTILLIER, AMERICAN DEMOCRACY AND NATURAL LAW 113.

[55] *See Federalists* 1, 10, 19, 31, and 51.

[56] JOSEPH STORY, *Natural Law, in* Encyclopedia Americana 9:150-158 (Francis Lieber ed., rev. ed. 1836).

his treatment of the history of the Revolution, the history of the adoption of the Constitution, and his lengthy commentary on the provisions of the Constitution, which made up the vast bulk of his three-volume *Commentaries*, he placed no emphasis on religious influences.[57] Story never mentioned the Ten Commandments in his treatise, while his single mention of the Bible came in a discussion of Freedom of the Press (§ 1875) with him merely noting that some governments have regulated the printing of the Bible and its translation.

Also, in his widely read *A Course of Legal Study* (1836), University of Maryland professor David Hoffman wrote that "[t]he purity and sublimity of the morals of the Bible have at no time been questioned; it is the foundation of the common law of every christian nation."[58] Although Hoffman maintained the law had a philosophical debt to the Bible, referring to the biblical books of Leviticus, Numbers, and Deuteronomy as containing the "ritual, moral, and civil law of the Jews," he, like Story, stopped short of claiming that Anglo-American law was derived from the Decalogue or Pentateuch. In fact, Hoffman cautioned his readers against drawing parallels between scripture and the law, noting that the Bible's "figurative [and] symbolic language" presented a "most serious impediment" to applying biblical principles to the law.[59] Even then, these references – which support the Petitioners' claims in only the vaguest sense – are the exception to the general understanding that the law was derived from secular sources.

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[57] *See generally* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833).

[58] DAVID HOFFMAN, A COURSE OF LEGAL STUDY 1:65-78 (1836).

[59] HOFFMAN, A COURSE OF LEGAL STUDY 66, 68, 71-72, 74-75.

C. Early American Common Law Reflects No Significant Reliance on the Ten Commandments.

In addition to the lack of references to the Ten Commandments in the founding documents, there also is no significant reliance on the Commandments in early American case law. Granted, in a handful of early nineteenth century cases judges drew parallels to the fourth commandment when validating the enforcement of Sunday laws.[60] In a few other cases, judges made rhetorical references to the Decalogue when interpreting rules governing labor or judicial activity on Sundays.[61] For the most part, however, early judicial references to the Ten Commandments were not detailed, with most allusions being illustrative or oratorical, and with the courts not relying on the Decalogue as authority for their holdings.[62] Rather, the courts upheld the laws as valid health and labor regulations.[63] In essence, the biblical references were hortatory, with the holdings resting on secular legal grounds.[64]

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[60] *See, e.g., New York v. Hoym*, 20 How. Prac. 76, 78-79 (N.Y. Super. 1860); *City Council v. Benjamin*, 2 Strob. 508, 523 (S.C. 1845); *Pennsylvania v. Wolf*, 3 Serg. & Rawle 48 (Pa. 1817).

[61] *See, e.g., Fox v. Abel*, 2 Conn. 541, 554 (1818).

[62] *See, e.g., Neal v. Crew*, 12 Ga. 93, 100 (1852); *New York v. Hoym*, 20 How. Prac. 76 (N.Y. Super. 1860); *Kountz v. Price*, 40 Miss. 341 (1866); *Theisen v. McDavid*, 16 So. 321 (Fla. 1894); *Rosenbaum v. Arkansas*, 199 S.W. 388 (Ark. 1917).

[63] *See, e.g., Ex parte Andrews*, 18 Cal. 678 (1861); *Melvin v. Easley*, 52 N.C. 356 (1860); *McGatrick v. Wason*, 4 Ohio St. 566 (1855); *Sparhawk v. Union Passenger Ry. Co.*, 54 Pa. 401 (1867); *North Carolina v. Brooksbank*, 28 N.C. 73 (1845); *North Carolina v. Williams*, 26 N.C. 400 (1844); *Specth v. Pennsylvania*, 8 Pa. 312 (1840).

[64] *See* Green, *Fount of Everything Just and Right*, at 555.

For example, in one early case, *Pearce v. Atwood*, 13 Mass. 324 (1816), the Massachusetts Supreme Judicial Court upheld a Sunday law as based on "common practices."[65] Referring to the fourth commandment, the court noted that "it may be inferred, that one day in seven was, according to divine will, to be set apart as a day of rest from labor." But, the court continued, "it is not necessary to resort to the laws promulgated by Moses, in order to prove that the Christian Sabbath ought to be observed by Christians, as a day of holy rest and religious worship."[66] The court viewed its authority as arising from the "uniform usage" among the Christian citizens of the state, not from any religious basis for the law.

Furthermore, court decisions pertaining to the Sabbath and the other subject matter addressed in the Ten Commandments represent a small subset of the areas of decisional law; the vast majority of court decisions – both from the early American period and today – make no mention whatsoever of the Commandments or biblical law.[67]

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[65] 13 Mass. at 345-46.

[66] *Id.* Noting that "some among our ancestors so far regarded the laws of Moses as of perpetual obligation," the Court held that none of the "rigid laws of Moses" held sway in the Commonwealth. *Id.* at 346.

[67] Petitioners and their amici rely on several nineteenth and early twentieth century cases where judges declared a connection between the Ten Commandments and the law. *See* Pet. Br. at 25-29; Br. Amicus Curiae of Wallbuilders, Inc., *passim*. First, as discussed, the vast majority of those references were hortatory with no examination of the historical record. But, more important, the uninformed statement of a judge does not establish an historical fact.

D. Contemporary Statutory and Common Law Reflects Little Religious Influence of the Ten Commandments.

The developments that have taken place in the past century have further diluted any religious influences on the law, such that the vast majority of contemporary statutory and common law reflects no religious influence. *Accord McGowan v. Maryland*, 366 U.S. 420, 433-36 (1961) (documenting the growing secularization of Sunday laws beginning in the eighteenth century). The areas of contemporary law that developed independently of the Ten Commandments include the law of corporations and business transactions; riparian law; immigration law; tax law; environmental law; Native American law; international human rights law; international business law; antitrust law; administrative law; bankruptcy; intellectual property law; civil rights law; estate planning and probate; women's rights law; education law; licensing and regulation of professions; dram shop laws and liquor regulation; insurance law; traffic law; science and computer technology law; regulations regarding nudity and obscenity; criminal procedure, including the rights to a jury trial and against self-incrimination; and criminal statutes prohibiting vagrancy, statutory rape, assault and battery, arson and property destruction, underage drinking, use of narcotics, and kidnaping.[68] Indeed, it is difficult to find any aspect of contemporary American law that can be fully and directly traced to the Ten Commandments.

[68] *See generally* FRIEDMAN, HISTORY OF AMERICAN LAW; *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICA LAW, 1780-1860 (1977) (describing the transformation of American law from relying on natural law concepts to adopting an instrumental approach).

III. EVEN IF SOME OF THE PRECEPTS REPRESENTED IN THE TEN COMMANDMENTS HAVE INFLUENCED AMERICAN LAW, THE TEN COMMANDMENTS AS AN AGGREGATE DOCUMENT LACKS A SIMILAR STATUS.

Although the precepts found in some of the individual commandments may find parallels in Anglo-American law (e.g., homicide, theft, false witness), the first "table" or section of the Ten Commandments concerns purely religious duties – worshipping God, avoiding idolatry, not using God's name in vain, and observing the Sabbath – that have no parallels in civil law. *See Stone*, 449 U.S. at 41-42.[69]

But more important, even if some individual commandments could have an indirect connection to modern legal precepts, their presentation as an aggregate unit – in this case, a highly recognizable unit with indisputable religious significance – mutes any secular aspects of those individual commandments. In essence, the *Ten Commandments* is an aggregate religious document. In that form, the commandments are from God, not from some secular authority. The fact that a secular authority could also mandate fealty to the precepts contained in a handful of individual commandments does not make their presentation as part of the Ten Commandments non-religious. Conversely, the fact that some of the individual commandments may parallel secular legal precepts does not mean that the Ten Commandments, as an aggregate religious

[69] "The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. *See Exodus* 20:12-17; *Deuteronomy* 5:16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. *See Exodus* 20:1-11; *Deuteronomy* 5:6-15." 449 U.S. at 41-42.

document, "profoundly influenced the formation of Western legal thought" and served as "the foundation of our legal tradition." The historical record, as discussed above, demonstrates otherwise.

CONCLUSION

While the Ten Commandments have influenced some of our notions of right and wrong, a wide variety of other documents have played a more dominant and central role in the development of American law. No scholar who has seriously studied this issue would assert that the Ten Commandments has played a dominant or major role, or even a significant role, in the development of American law as a whole. To insist on a closer relationship or to claim the that Ten Commandments has a special place in the development of American law lacks historical support.

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